***THE HON'BLE SRI JUSTICE BILAL NAZKI,**

THE HON'BLE SRI JUSTICE S.ANANDA REDDY

AND

THE HON'BLE SRI JUSTICE L.NARASIMHA REDDY

+WRIT PETITION Nos.22680 of 2000 and 13306 of 2004

%Dated 26-11-2004

Between:

M/s. Panchalingal Carbonic Gas Pvt. Ltd., Panchalingala (V),

Kurnool District, rep.by its Managing Director Sri G.V.Ramasubbaiah.

..... PETITIONER

AND

State of Andhra Pradesh, rep.by its Secretary, Industries and Commerce Department, Secretariat, Hyderabad and others.

...RESPONDENTS

! Counsel for Petitioners : Mr. D.Vijay Kumar, Advocate

^Counsel for Respondent Nos.1 & 2 : G.P. for Industries

^Counsel for Respondent No.3 : Spl. G.P. for Taxes.

<GIST:

> HEAD NOTE:

? Cases referred

W.P.No.8970/2003 & batch, dt.22-10-2003

36 APSTJ 37

AIR 1961 SC 1047

2001 (7) SCC 71

(1960) 11 STC 827

99 STC 83

2001 (7) SCC 525

1998 (8) SCC 85

(1987) 165 ITR 550

1999 (237) ITR 59

1986 (63) STC 239

1998 (6) SCC 577

1997 (7) SCC 251

(1979) 2 SCC 409

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

FRIDAY, THE TWENTY SIXTH DAY OF NOVEMBER
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE MR JUSTICE BILAL NAZKI,

THE HON'BLE MR JUSTICE S.ANANDA REDDY

And

THE HON'BLE MR JUSTICE L.NARASIMHA REDDY

–

WRIT PETITION Nos.22680 of 2000 & 13306 of 2004

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W.P.No.22680 of 2000 :

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Between:

M/s Panchalingal Carbonic Gas Pvt. Ltd., Panchalingala (V)
Kurnool District, rep.by its Managing Director Sri G.V.Ramasubbaiah.

..... PETITIONER

AND

1 State of Andhra Pradesh, rep.by its Secretary,
Industries & Commerce Department, Secretariat, Hyderabad.
2 The Commissioner of Industries, Government of Andhra

Pradesh, Hyderabad.
3 Commercial Tax Officer II, Kurnool, Kurnool Dist .

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue writ of mandamus or any other appropriate writ or order or direction, declaring that (i) circular Memo No.20/1/2000/0144/FD, Dt.17/05/2000 issued by the respondent NO.2 is illegal, void and inoperative or in alternative declare that it has no application to the petitioner's case and (ii) consequently declare that the petitioner is entitled to all incentives including Tax Holiday benefit for a duration of seven years w.e.f. 29/05/1997 under the Target-2000 Scheme in terms of final eligibility certificate isseud by Respondent No.2 in File No.20/1/7/0556, Dt.22/5/1997 and pass such other order.

Counsel for the Petitioner : MR.D.VIJAYA KUMAR

Counsel for Respondent Nos.1 & 2 : G.P. for Industries

Counsel for Respondent No.3 : Spl. G.P. for Taxes.

The Court made the following :

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W.P.No.13306 of 2004:

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Between:

M/s Godavary Gas Company Pvt. Ltd, Plot No. 39, 40, 41,

Block - D Expansion,IDA, Gajuwaka (M), Visakhapatnam District, rep. by its Managing Director K. Raghavendra Rao,
s/o Late K. Venkaiah, aged 64 years, R/o Visakhapatnam.

..... PETITIONER

AND

-

1 State of Andhra Pradesh, rep. by its Secretary,
Industries & Commerce Department, Secretariat, Hyderabad
2 The Commissioner of Industries, Government of Andhra

Pradesh, Hyderabad.
3 Additional Director of Industries (N) FAC,

Government of Andha Pradesh, Hyderabad.
4 Commercial Tax Officer, Gajuwaka, Visakhapatnam.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue appropriate Writ, order or direction more particularly in the nature of Writ of Mandamus (i) declaring the action of the 3rd respondent in so far as cancelling the industrial incentives granted to the petitioner in terms of G.O.Ms.No. 108 dt. 20-5-1996 as illegal , void and inoperative and accordingly set aside the order of Additional Director of Industries (N) FAC, Commissioner of Industries, Hyderabad dt. 7-7-2004 in Procgs No. 10/1/6/1792/FD and (ii) set-aside the consequential Urgent Notice Dt. 21-7-2004 issued in Rc.No. 891/2003 B4 by the Commercial Tax Officer (FAC) , Gajuwaka, Visakhapatnam.

Counsel for the Petitioner : MR.M.VIJAYA SARATHI REDDY

Counsel for Respondent Nos.1 to 3 : G.P. for Industries.

Counsel for Respondent No.4 : Special G.P. for Taxes.

THE HON'BLE SRI JUSTICE BILAL NAZKI,

THE HON'BLE SRI JUSTICE S.ANANDA REDDY,

AND

THE HON'BLE SRI JUSTICE L.NARASIMHA REDDY

WRIT PETITION Nos.22680 of 2000 & 13306 of 2004

COMMON JUDGMENT :(per the Hon'ble Sri Justice S.Ananda Reddy)

The petitioners in these two writ petitions are small-scale industries. Initially, they were extended the benefit of Deferment/Tax holiday on sales-tax, under a scheme framed by the Government of A.P, known as 'Target-2000'. However, the exemption was cancelled at a subsequent stage. The writ petitions are filed challenging the orders of cancellation.

2. During the course of hearing of the writ petitions before a Division Bench, the petitioners relied upon the judgment in ***Surya Mineral Waters, Somavarapadu v.***

The Commissioner of Industries, in support of their contention. The respondents on the other hand, resisted the contention, by placing reliance upon the judgment of another Division Bench of this Court, in ***SHV Energy South East Ltd. v. State Instrument Promotion Board***. The Division Bench felt that there is conflict of views on the issue, and referred the matter to a Full Bench. That is how the writs are listed before this Bench.

3. With a view to encourage the establishment of industries in this State, the Government of A.P., issued G.O.Ms.No.108, Industries and Commerce Department, dated 20.5.1996, providing for various incentives, for new industrial units, under the scheme known as `TARGET-2000' (for short "the scheme"). The incentives were made available only to those units, which are established outside the limits of Municipal Corporations of Hyderabad, Vijayawada and Visakhapatnam. The incentives included 20% of the fixed capital investment subsidy, subject to a limit of Rs.20.00 lakhs, Deferment/tax holiday on sales-tax, limited to 135% of the Fixed Capital investment, spread over a period of 14 years, etc. The schedule contained a list of 58 items of industries, which are ineligible for the incentives.

4. The petitioner in W.P.No.22680 of 2000, established a Carbon Dioxide Bottling unit, in Kurnool District, with an investment of Rs.18.66 lakhs. It was issued final eligibility certificate on 22.5.1997, in terms of the scheme. Its final eligibility was fixed at Rs.25,19,100/-. The nature of activity undertaken by it, comprises of purchasing carbon dioxide in its liquid form, converting the same into gaseous form, by pumping the same through a device, known as vaporizer, with Aluminum fins. The carbon dioxide, in its gaseous form is filled in to small cylinders and supplied to the customers.

5. The Commercial Tax Officer, Circle II, Kurnool, the third respondent in that writ petition, issued notice, dated 7.8.2000, to the petitioner, stating that the Commissioner of Industries, through his orders, dated 17.5.2000, directed cancellation of sales tax exemption, issued in favour of gas bottling units, and in that view of the matter, the petitioner is liable to pay sales tax, with effect from 31.3.2000. He required the petitioner to pay a provisional tax of Rs.1,76,240/-.

6. The petitioner in W.P.No.13306 of 2004 established a small-scale industry of bottling of oxygen, in visakhapatnam District, with an investment of Rs.57.59 lakhs. It was also issued final eligibility certificate, dated 14.8.1996, in terms of the scheme. The activity undertaken by this petitioner is similar to that of the other writ petitioner, except that, the gas is Oxygen. In their case, the Commissioner of Industries, issued a show-cause notice, dated 24.11.2003, proposing to cancel the sales-tax exemption, granted to the petitioner. It filed W.P.No.27232 of 2003, against the show-cause notice. The writ petition was disposed of, leaving it open to the petitioner, to submit explanation. An explanation was submitted, and thereafter, an order of cancellation of the incentives, was passed. On the basis of that order, the petitioner was required to remit a sum of Rs.27,75,669/-, towards Sales tax payable from 31.3.2000.

7. The petitioners contend that the industries established by them were found to be eligible, to be extended the benefit under the scheme, and once the final eligibility certificates were issued in their favour, it was not open to the respondents, to withdraw the exemption and demand tax. They also contend that in the list of the final eligibility, a condition was imposed to the effect that they shall not collect sales tax from the consumers, and in that view of the matter; they did not collect any tax from their customers.

8 Sri S.R. Ashok, learned senior counsel, appeared for the petitioner in W.P.No.13306 of 2004, and Sri D.Vijay Kumar, appeared for the petitioner in W.P.No.22680 of 2000. The gist of their arguments is that the industries established by the petitioners were found to be eligible, to be extended the incentives, so much so, the final eligibility certificates were issued to them. They contend that the plea taken by the respondents, that no manufacturing activity takes place in the process of Bottling of gases, cannot be sustained. According to them, the gas purchased by the petitioners, be it Oxygen or Carbon dioxide, in its liquid form, is different from the end products, supplied by them. They submit that for all practical purposes, the liquid gas constitutes the raw material, or at least an input, and through the process of manufacturing, it is converted in to a marketable commodity in gaseous form. It is

also their case that as long as the industries established by the petitioners, are not included in the annexure to G.O.Ms.No.108, it is not open to the respondents, to snap the benefits conferred upon the petitioners, in terms of the scheme. They contend that the judgment in **SHV Energy South East Ltd.** (2 supra) is distinguishable, for the reason that the nature of activity in that case, was mostly in the form of packing the same product from a larger container to a smaller container. In addition to placing reliance upon the judgment of this Court in **Surya Mineral Waters'** case (1 supra)**,** they also relied upon various judgments rendered by the Supreme Court touching the subject.

9. An alternative submission made on behalf of the petitioners, is to the effect that even if the activity undertaken by them does not involve manufacturing, the respondents are precluded from withdrawing the exemption under the principle of equitable estoppel. They urge that but for the representation from the respondents, they would not have established those industries.

10. Learned Government Pleader for Commercial Taxes, submits that the scheme was framed to encourage establishment of manufacturing industries, and not those, which do not involve in the process of manufacturing. He submits that a perusal of the scheme, particularly with reference to the annexure listing the nature of industries made ineligible, discloses that the thrust was to encourage the process of manufacturing. He submits that the activity undertaken by the petitioners, does not involve any manufacturing process. According to him, the product purchased by the petitioners, is supplied by them to the customers, simply by converting it from liquid to gaseous form. He too, relies upon certain judgments rendered by Supreme Court. Replying to the contentions as to estoppel, and non-collection of taxes by the petitioners, learned Government pleader submits that, the plea of estoppel is not available against the Government, that too, in the field of taxation, and that the liability to pay the tax under a statute, does not depend on the fact whether the dealer collected from the customer or not.

11. It is not in dispute that the commodity dealt with by the petitioners, is taxable

under the Andhra Pradesh General Sales Tax Act, 1957 (for short "the Act"). The petitioners were granted exemption from payment of sales tax, up to a limit of 135% of their fixed capital investment. At a later stage, the concerned authorities in the Industries and Commerce Department, appear to have taken the view that gas-bottling industries are not eligible for deferment/tax holiday. A general Circular, dated 17.5.2000 was issued, by the Commissioner of Industries, and the authorities in the hierarchy, followed it up, by making the demands on the grounds that the incentives granted to such industries stood cancelled. The question that falls for consideration in these writ petitions is as to whether the activity undertaken by the petitioners amounts to, or constitutes, manufacturing.

12. The word 'manufacture' becomes significant in the context of the extension of benefits under the scheme, because of the fact that Note (a) appended to the G.O., makes it clear that the exemption is only on products `manufactured' in the new industrial units. It is beneficial to extract the clauses that provided for the incentives and the relevant note. They read as under: -

"6) The following are the incentives under this "TARGET- 2000":-

6.01) All New Industrial units, whether large, medium or small other than those listed in the Annexure, to be located anywhere in the State of Andhra Pradesh, except within the Municipal Corporation areas of Hyderabad, Vijayawada and Visakhapatnam, and going into commercial production on or after November 15, 1995 are eligible for the following incentives.

6.02) Investment subsidy: 20% of the fixed capital investment but not exceeding Rs.20.00 lakhs.

6.03) Deferment/Tax Holiday on Sales Tax: Sales Tax Deferment limited to 135% of Fixed Capital investment in a period of 14 years. The deferred amount will be treated as deemed loan on making available security of fixed assets of the industry, pari-passu with financial institutions and on finalization of assessment by the Commercial Tax authorities for each year.

OR

Sales Tax Exemption for a period of 7 years, limited to a ceiling of 135% of fixed capital investment, during the entire holiday period, at the opinion of the industry, effective from the date of commencement of commercial production.

Note:

a) Sales Tax here refers to Sales tax on products manufactured in the New Industrial Units."

13. Notes (a), (b), and (d) provide for various methods, in which the incentives can be availed of, and how the rebate on electricity charges, is extendible. A perusal of the clauses, extracted above discloses that the thrust is on establishment of manufacturing industries. In the Annexure to the G.O., 58 items are listed, as industries ineligible for the incentives. These items include some industries, even where activities take place. It indicates the selective approach of the Government in the matter.

14. It is settled principle of law that the Statutes of Taxation have to be construed strictly and where two views are possible in relation to a provision; the one beneficial to the subject has to be adopted. The law in this regard was succinctly stated by the Supreme Court in ***Sales Tax Commissioner v. Modi Sugar Mills***. The interpretation of the provision granting exemption from taxation, however stand on a different footing. In ***Dadi Jagannadham v. Jammulu Ramulu***, a Constitution Bench of the Supreme Court held as under: -

"The Court (i) must start with presumption that legislature did not make a mistake (ii) must interpret so as to carry out the obvious intention of legislature; (iii) it must not correct or make up a deficiency, neither add nor read into a provision words which are not there particularly when literal reading leads to an intelligible result."

Further, the Supreme Court, in ***Tungabhadra Industries Ltd. v. Commercial Tax Officer***[5], held as under: -

> "In the case of an exemption, if the words of the rule are insufficient to cover the case, the reason behind the rule cannot be availed of to obtain the relief".

15. The taxability of the commodity in such cases would not at all be in doubt. The endeavor would be only to ascertain the extent to which the legislature or the Government, as the case may be, intended to relax the provisions. In this process, apart from the words used in the relevant clauses, the ultimate object in providing the incentive or relaxation, becomes relevant, and the same has to be gathered from an overall conspectus of the scheme.

16. The word 'manufacture' is not defined either under G.O.Ms.No.108 or under the Act. This word, however, has been the subject matter of interpretation by various judgments rendered by the Supreme Court as well as this Court. `Manufacture' in the context of industry and Trade, contemplates, bringing about a new product, from out of various substances, known as raw materials or inputs. Depending upon the nature of products, the process of manufacturing may be long and complicated, or short and simple. The best way to discern as to whether an act of manufacturing has taken place, is to verify the change that the inputs or raw materials have undergone in becoming the end product. If the end product is the same, or substantially the same as the input, it cannot be said that any activity of manufacturing has taken place. It would be useful to refer to the meanings assigned to the word `manufacture', in some of the dictionaries. They are as under: -

> (i) make something on a large scale using machinery- Concise Oxford Dictionary (Tenth Edition):

> (ii)make or produce (something abstract) in a merely mechanical way – The New Oxford Dictionary of English (Indian Edition)

> (iii) `Manufacture' implies a change, but every change is not a manufacture and yet every change in an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation, a new and different article must emerge having a distinctive

name, character or use (as defined by the Supreme Court in Union of India V. Delhi Cloth Mills – AIR 1963 SC 791) – Judicial Dictionary by Justice L.P.Singh & P.K.Majumdar, Advocate (Second Edition)

17. In ***Commissioner of Sales Tax v. Jagannath Cotton Co.***[6], the Supreme Court had an occasion to deal with a situation similar to the one in the instant case. The state of Orissa provided for incentives for establishment of industries. As in the G.O.Ms.No.108, in that case also, the word `manufacture' was not defined. The Supreme Court observed that `manufacture' in its ordinary connotation signifies the emergence of new and different goods as understood in relevant commercial circles. Reference was made to various expressions used in the scheme such as "purchase of raw material", "finished products" etc. Ultimately it was held that the intention of the Government was to extend the benefits only to those industries, which undertake manufacturing of goods, and such process shall involve in manufacture of products different from the inputs. The judgment of the Orissa High Court taking a different view was reversed by the Supreme Court.

18. In ***Aspinwall & Co. Ltd. v. CIT***[7]**,** the Supreme Court interpreted the term `manufacture' occurring in Section 32-A of the Income-tax Act. That case related to the manufacture of coffee. The revenue contended that, the assessee did nothing more than collecting coffee berries, subjecting them to some treatment, and that ultimately, the end product was not different from the raw material. The Tribunal as well as the High Court accepted that contention. The Supreme Court explained the word `manufacture' as under: -

> "The word `manufacture' has not been defined in the Act. In the absence of a definition of the word `manufacture' it has to be given a meaning as is understood in common parlance. It is to be understood as meaning the production of articles for use from raw or prepared materials by giving such materials new forms, qualities or combinations whether by hand labour or machines. If the change made in the article results in a new and different article then it would amount to manufacturing activity".

The conversion of coffee seeds in to coffee beans was held to be a manufacturing activity, and it was observed;

> "If a commercially different article or commodity results after processing, then it would be a manufacturing activity".

19. Another case relied upon by the parties is ***Ashirwad Ispat Udyog v. State Level Committee***[8]**.** It did not relate to grant of incentives, and was about the very taxability of the product. Much depended on the fact whether the dealer has undertaken the process of manufacture of the products, sold by it. The dealer therein purchased scrap of defective angles, flats, channels, tubes and coils, cut them in to useful sizes of thickness; and sold them to customers. The dealer was held to have undertaken the process of manufacture in view of the language employed in Section 2(j) of M.P.G.S.T.Act. The definition was so wide, as to include the process of producing, collecting, extracting, preparing or making any goods by lopping, cutting etc. The same cannot be said to be directly on the point in issue in this case, because, such a definition is not found in the Act or the scheme.

20. In ***C.I.T v. Union Carbide India Ltd. (Cal.)***[9]**,** the Calcutta High Court had to interpret Section 80-j of the Income-tax Act. The question was as to whether "the Deep Sea Fishing Division of the assessee" can be treated as an industrial undertaking, within the meaning of that provision. The process undertaken by assessee, was to get shrimps from deep sea, and to convert them to frozen fish and fish products. Since the operation consisted of cleaning, peeling, packing, freezing the shrimps to make them marketable, it was held that a manufacturing process ensued, out of which, a new commercial product has come into existence. This view, was however, reversed by the Supreme Court in ***C.I.T v. Relish Foods***[10]**.** Relying upon its own judgment in ***Sterling Foods v. State of Karnataka***[11]**,** the Supreme Court held that the process of peeling, deveining, cleaning and freezing of shrimps by itself, cannot be said to have brought about a distinct commodity or product. It was observed that there is no essential difference between raw shrimps on the one

hand, and prawns and the processed or frozen shrimps and prawns, on the other hand.

21. A reverse claim made came to be considered by the Supreme Court in ***B.P. Oil Mills Ltd. v. Sales Tax Tribunal***[12]**.** In that case, the dealer was engaged in the activity of purchasing crude oil of different varieties, refine the same through a process and selling the product. It was pleaded that the appellant did not undertake any activity of manufacturing, except that the crude oil was refined and as such, it is not liable to pay the tax. The U.P. Trade Tax Act defined the word `manufacture' to mean producing, making, mining, collecting, extracting, altering, ornamenting, finishing or otherwise processing, treating or adopting any goods. The definition also provided that it does not include such manufacture or manufacturing processes, as may be prescribed. On the basis of the wide terms used in the definition, the Supreme Court held that processing and refining of crude oil amounts to manufacturing, and thereby held the appellant liable to pay the tax.

22. From the above discussion, it is evident that the word `manufacture', unless defined by the concerned Statute, shall be taken to mean the process through which an altogether new product from the point of utility, marketability and commercial value is brought about. Mere change of form by itself, cannot be treated as process of manufacturing.

23. In the instant case, it is not in dispute that the petitioners purchased, Oxygen or Carbon dioxide, as the case may be, in its liquid form, converted the same into gaseous form, filled it in cylinders, and supplied the same to the customers. The said gases are converted into liquid form by the original manufacturers only for the purpose of effective and safe transport to the bulk customers, such as the petitioners. The gases in their liquid form are, in no way different, when they are converted in to gaseous form. The chemical properties and other characteristics of both are the same. In fact, before transformation in to liquid form, it is in gaseous state only. In highly compressed state, and at a very low temperature, the gas assumes liquid form. Huge volume of gas can be transported or preserved in a relatively smaller container in liquid form. It is true that the conversion of gas from the liquid to gaseous

state needs specific equipment and maintenance of different temperatures etc. This, however by itself, cannot be treated as a manufacturing process, as long as the product continues to hold the same characteristics. Therefore, it cannot be said that the petitioners were undertaking any manufacturing process.

24. In ***SHV Energy South East Ltd****. (2 supra)*, a Division Bench of this Court dealt with the instances of bottling of LPG gases. That was also with reference to the cancellation of exemptions granted under G.O.Ms.No.108. The term `manufacture' was discussed by the Division Bench. The discussion was confined mainly to the activity of the petitioners therein and not with reference to the various terms contained in the scheme. The Bench observed as under: -

> "For the aforesaid reasons, we are of the considered opinion that the petitioner's industrial units are, in no manner, engaged in the activity of `production of bottled LPG'. There is no manufacturing process as such involved. The bottled LPG is not entirely a different product as such. It is not a new substance. Mere change in the substance does not amount to any manufacture. The character of the substance remained the same even after bottling. It is not a new commercial commodity brought into existence. It is very well settled that the expressions in the notifications for exemption should always be understood by the language employed therein bearing in mind the context in which the expressions occur. "The words used in the provision imposing tax or granting exemption should be understood in the same way in which these are understood in ordinary parlance in the area in which the law is in force or by the people who ordinarily deal with them".

As to the principles of interpretation of provisions granting exemption, the Bench held:

> It is equally well settled principle that a person who claims exemption has to establish his case. The principle that in case of ambiguity; a taxing statute should be construed in favour of the assessee – assuming that the said principle is good and sound – does not apply to the construction of an exception or an exempting provision; they have to be construed strictly. A person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision. In case of doubt or ambiguity, benefit of it must go to the State. This is for the reason, viz., each such exception/exemption increases the tax burden on

> other members of the community correspondingly. Once, of course, the provision is found applicable to him, full effect must be given to it. The notification granting exemption has to be interpreted in the light of the words employed by it and not on any other basis.

Accordingly, the Division Bench negatived the claim of the petitioners that their activity involves manufacture.

25. In ***Surya Mineral Water's*** case (1 supra) another Division Bench of this Court dealt with the withdrawal of incentives, in G.O.Ms.No.108, dated 20-05-1996, extended to the industries involved in the activity of packaged drinking water. The Bench did not go into the question whether the activity of making packaged drinking water, involves the process of manufacturing. It proceeded on the footing that drinking water/mineral water is a product different from ordinary water, particularly in view of the fact that, it is only the former that is included in entry 21 of Schedule VI of the Act liable to tax, where the latter included in entry 12 of Schedule IV, which is not liable to tax. As to the necessity to construe the expression 'manufacture', the Bench observed as under:

> "…As indicated by us the expression `manufacture' is not defined in the G.O., by the Government while announcing incentives, it is not necessary for us to give a finding as to whether the process involved in the making of packaged drinking water would amount to manufacturing activity or not. We are convinced that since the legislature itself has distinguished these two commodities as separate and taxed them at different rates, the respondents are not justified in denying the concessions on the ground that activity undertaken by the petitioners in the making of packaged drinking water, falls under the VI Schedule and liable to be taxed at 12%…".

26. In that view of the matter, it cannot be said that this case is an authority on the interpretation of the word 'manufacture' in the context of G.O.Ms.No.108, dated 20-05-1996. What made it imperative to refer to the said judgment is that, following the same, the activity of purchasing and sale of Carbon Dioxide was treated as a manufacturing activity in W.P.No.27090 of 2003, disposed of on 10-02-2004. The judgment in ***SHV Energy South East Ltd. v. State Instrument Promotion Board***

(2 supra), which was decided earlier, in point of time, was neither referred to, nor distinguished. It has already been seen that it was in that case that discussion to certain extent was undertaken to interpret the word 'manufacture', whereas the Bench in ***Surya Mineral Waters'*** case (1 supra) made it amply clear, that the Court did not feel the necessity to go into the question. In our view, the question involved in W.P.No.27090 of 2003, could not have been decided, unless it was answered whether the activity undertaken by the petitioner therein amounted to manufacture.

27. In that view of the matter, the judgment in ***Surya Mineral Waters' case*** *(1 supra)*, cannot be said to be an authority for the proposition that purchase and sale of Carbon Dioxide/Oxygen by the petitioners involves the process of manufacturing, and that units undertaking such activity are entitled for the incentive of tax holiday under G.O.Ms.No.108, dated 20-05-1996. Even if the principle of ***Surya Mineral Waters' case*** *(1 supra)* as to the entries in the Schedule to the Act is applied, still the petitioners are not entitled to the benefits as "all kinds of gases whether in compressed, liquefied or solidified or in other form' falls under same entry 23 of Schedule VI to the Act. The judgment in ***SHV Energy South East Ltd.***
(2 supra) represents the correct law on the subject.

28. Strictly speaking, with the above finding and observation, the reference to the Full Bench stands answered. However, learned counsel for the parties have addressed arguments on the other subsidiary aspects also, namely, the effect of withdrawal of the incentive and the liability of the petitioners to pay the demanded tax.

29. Whatever be the nature of activity undertaken by the petitioners, one thing is clear. The respondents held out a clear and unambiguous promise to the petitioners to the effect that if they established the industries in question, they were to be entitled for the various incentives provided for under the scheme. Any doubt that existed in this behalf stood removed with the issuance of final eligibility certificates to the petitioners, with specific reference to G.O.Ms.No.108. It is not as if the petitioners made any misrepresentation to the respondents as to the nature of their

activity or the various steps involved in their industries. The respondents were clearly of the view that the petitioners are entitled for the benefit, and have accordingly extended the same. It may be true that in the ultimate analysis, the respondents ought not to have extended the benefit at all.

30. If it were to be a case, where the incentives in the form of permitting the petitioners to collect the tax and appropriate the same for themselves without remitting it to the Government, things would have been different. With the finding that they were not entitled for such benefit, there would not have been any difficulty in making the petitioners to shell down what they have collected towards tax. However, in the scheme under consideration, the petitioners or other beneficiaries, who are extended the incentive, were prohibited from collecting the tax. Clause (vi) of the letter of final eligibility reads as under:

> "**Clause (vi)**: The SSI unit is not entitled to collect Sales tax from the consumers and further they would be liable to remit the sales tax collected to Govt., in case they collect sales tax during the availment period of sales tax exemption."

31. Therefore, once the petitioners were not only disabled, but in fact, were prohibited from collecting tax, it is impermissible to compel them to pay the tax, which they did not collect. This observation of ours is not without judicial authority.

32. In ***Pawan Alloys & Casting Pvt. Ltd. v. U.P.S.E.B.***[13], the Supreme Court held that the principle of promissory estoppel applies against the Government, but it has to yield, if there exists a supervening public equity. It was made clear that, it is for the Courts to examine and verify as to whether there existed such supervening public equity, warranting abrogation of the liability of Government under the principle of promissory estoppel. Reference was made to the judgment in ***Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P*** [14]. On facts, it was held that there existed any supervening public equity, public equity, which made the principle of equitable estoppel inapplicable. In other words, if such equity does not exist, the principle of equitable estoppel can be applied against the state. Except the change in mind of the authorities or a belated realisation of the true purport of the scheme, no

"supervening public equity" is pleaded by the respondents in the present case.

33. In ***Pawan Alloys & Casting Pvt. Ltd.'s*** case *(13 supra),* the Supreme Court held as under:

> "If the State or a statutory authority or an executive authority of the State or its limb like the State Electricity Board covered by Article 12, functioning on behalf of the State, in exercise of its legally permissible powers, has held out any promise to a party, who relying on the same, has changed its position not necessarily to its detriment, and if this promise does not offend any provision of law or does not fetter any legislative or quasi-legislative power inhering in the promisor, or is not otherwise opposed to public policy, then on the principle of promissory estoppel the promisor can be pinned down to the promise offered by it by way of representation containing such promise for the benefit of the promisee".

34. If this principle is applied to the facts of the present case, the petitioners cannot be made to pay the demanded tax. However, if, on verification by the respondents, it emerges that petitioners have collected the sales tax from any of their customers, it shall be open to them to recover such amount from the petitioners.

35. For the foregoing reasons, it is held that;

a. the activity of the petitioners does not involve the process of manufacture, irrespective of the difference as to the form, in which it is purchased by the industry, and the form in which the same is supplied to its customers.

b. Incentive of deferment/tax holiday on sales tax under G.O.Ms.No.108, dated 20-05-1996 are available only to those industries, where the process of manufacturing takes place, subject, to their not having been excluded under the annexure.

c. The liability to pay the tax arising out of cancellation of incentives would start from the date on which such orders become operative, and it shall be open to the Government to recover any tax from such units, if it is found that they have collected the sales tax on such product during the subsistence of the incentives.

There shall be no order as to costs.

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BILAL NAZKI, J

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S.ANANDA REDDY, J

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L.NARASIMHA REDDY, J

Dated : 26th November, 2004

Note:- L.R.Copy to be marked.

(B/o) KVH

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2. One fair copy to the Hon'ble Sri Justice S.Ananda Reddy (for his Lordship's kind perusal).

3. One fair copy to the Hon'ble Sri Justice L.Narasimha Reddy (for his Lordship's kind perusal).

4 The Secretary, Industries & Commerce Department,

Govt.of A.P., Secretariat, Hyderabad.

5 The Commissioner of Industries, Government of Andhra

Pradesh, Hyderabad.

6 Commercial Tax Officer II, Kurnool, Kurnool Dist .

7 Additional Director of Industries (N) FAC,

Government of Andha Pradesh, Hyderabad.

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THE HON'BLE SRI JUSTICE BILAL NAZKI,

THE HON'BLE SRI JUSTICE S.ANANDA REDDY,

AND

THE HON'BLE SRI JUSTICE L.NARASIMHA REDDY

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WRIT PETITION Nos.22680 of 2000 & 13306 of 2004

COMMON JUDGMENT :

(per the Hon'ble Sri Justice S.Ananda Reddy)

Dated 26-11-2004